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IN THE

Supreme Court of the United States

October Term, 1966

No. 584

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Petitioner,

against

NATIONAL SCREEN SERVICE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF—IN OPPOSITION

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Preliminary Statement

Respondent herein, since about its inception, has at all times been engaged in servicing and licensing to and for use by motion picture exhibitors—of abbreviated previews (commonly referred to as "trailers"), and other motion picture advertising and display material employed by exhibitors to publicize coming attractions in advance of the actual exhibition of a motion picture (App. 2).

The "trailers" and advertising material in question are never sold by Respondent, but merely licensed for use by the exhibitor, until after the picture has been exhibited at the theatre in question, and then the advertising material, including the trailers, are returned to Respondent which

owns the trailers, posters and other material in question (App. 2).

Petitioner is an insurance company which, on December 31, 1953, issued to Respondent its policy known as a "COMPREHENSIVE GENERAL LIABILITY POLICY"—insuring Respondent against claims asserted against the assured for property damage or bodily injury or both, allegedly sustained by reason of the insured's negligence (Appellee's Ex. 1, 268a, ff).

The policy in suit, issued on December 31, 1953, for a term of one year, insured against all claims and liability which may be asserted by third parties against Respondent for its alleged negligence in connection with the operation of its business, which is described on the face of the very first page of the policy as follows:

> "MOTION PICTURE PREVIEWS-DISPLAYS". (Id. 269a).

In the section of the policy (appearing on the next page) entitled "INSURING AGREEMENTS", the Petitioner agreed (in par. II entitled: "DEFENSE, SETTLEMENT, SUPPLEMENTARY PAYMENTS") to:

> "defend any suit against the Insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient"; Id. 269a, Sheet 2).

In a further provision entitled Coverage "B" Petitioner agreed:

> "To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident". (Id. 268a, Sheet 2.)

The Accident Involved Herein.

The instant action arose out of Petitioner's refusal to assume the defense of numerous actions brought against Respondent herein, and Southern Railway, instituted in the Courts of North Carolina, in which the third party claimants in those actions charged the Southern Railway and the Respondent herein, with negligence in connection with Respondent's shipping scrap motion picture film—which the third-party claimants contended was involved in the fire which occurred on June 24, 1954, in the warehouse of Southern Railway at Charlotte, North Carolina—damaging claimants' property.

Concerning the facts involved in Respondent's shipping the scrap film, by Southern Railway, to Eastman Kodak Company in Rochester, New York, for Eastman's purchase of this scrap film for silver salt salvage—the Court found, and it is not disputed, that the "film was shipped by transportation selected and paid for by National (Respondent), to Kodak's Rochester facility * * *. Kodak had the right, however, to reject any shipment" (App. 2-3).

Petitioner's Alleged Ground for Disclaimer.

More than four months after the fire, i.e., on November 1, 1954, Petitioner disclaimed any duty to defend the actions or to pay any judgments which might be recovered against the Respondent herein, stating that:

> "Our investigation discloses the property in question was turned over to the Southern Railway Company *and was in the possession of the Southern Railway at the time of the explosion on June 24, 1954.* Your policy does not afford protection for this situation." (Emphasis added)

Petitioner contends that its obligation under the policy terminated "after the insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the insured * * *". Petitioner contends

that the "products hazard" exclusionary rider so provides. "Products hazard" is defined in the policy as follows:

> "The term 'products hazard' means:
>
> (1) The handling or use of, the existence of any condition in or a warranty of goods or products manufactured, sold, handled or distributed by the named insured, other than equipment rented to or located for use of others but not sold, if the accident occurs after the insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the Insured or on premises for which the classification stated in Division (a) of the declarations or in the company's manual excludes any part of the foregoing" (App. 3-4).

Petitioner contended that delivery of the scrap film to Southern Railways' representative constituted relinquishing "possession" of Respondent's scrap and that such act relieved Petitioner of liability—by reason of the condition in the "Products Hazard" exclusionary rider to the policy.

Respondent contended that "Products Hazard" coverage was wholly inapplicable to its business—a contention which the learned Trial Court sustained (App. 6)—and that even if such coverage had been required, Respondent had not "relinquished possession in delivering the scrap to the railroad" since it owned title thereto and therefore had *constructive possession* of the scrap until Eastman Kodak received and accepted the scrap film at its plant in Rochester, New York—a contention which both the learned Court of Appeals as well as the Trial Court sustained (App. 6). In this connection, Circuit Judge Anderson, writing for the majority, said:

> "The central issue thus is whether National had possession of the film at the time of the loss, and that question in turn depends upon whether the word 'possession' as used in the policy clause should be read to include the concept of 'constructive possession' as well as actual possession.

"The trial judge held that (1) National's business, was such that it was 'not in a position to require it to purchase products liability coverage and that as such the products hazard exclusion would have no application to the facts present . . .' He also found that, in any case, the word 'possession', as used in the exclusion clause, included constructive as well as actual possession, and that therefore, since National still retained constructive possession of the drums at the time of the loss, USF&G remained liable on the policy.

"We think that it is not necessary to reach the question of whether National's business was such that it should have carried products liability insurance, as it is our opinion that the products hazard exclusion did not affect the coverage in this case" (App. 6).

Questions Presented

1. Did not the learned Court of Appeals and the District Trial Court correctly determine that in construing an exclusionary provision in a "Comprehensive General Liability policy"—covering "all risks"—*under New York law,* an insurer cannot escape liability unless "its own construction was the *only one* that fairly could be placed" on the exclusionary provision (*Sincoff* v. *Liberty Mutual Ins. Co.,* 11 N. Y. 2d 386)—and since as this Honorable Court held—"there is no word more ambiguous in its meaning than possession . . . interchangeably used to describe actual possession or constructive possession which so often shade into one another that it is difficult to say where one ends and the other begins" (*National Safe Deposit Co.* v. *Stead,* 232 U. S. 58)—that in view of Respondent's business, "It is hardly likely that it was the reasonable expectation of the insured, or its purpose, to purchase liability insurance to cover its product only while it was inside the gates of its own plant and that it would become its own insurer while the product was in the hands of a delivery man and a common carrier . . . when the chance of injuries to third persons was even greater" (App. 10), and that therefore "it is apparent that the general rules of interpretation of insurance policies adopted by the New York Courts lead to the conclusion that the word '*possession*' as used in the exclusion clause of the policy in question should be construed to include '*constructive possession*'" (App. 10; 6)?

2. Applying the principle announced by this Honorable Court in *Ruhlin* v. *New York Life Insurance Company,* 304 U. S. 202, 206 that: "As to questions controlled by State law, however, conflict amongst circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the State Courts"—should not Certiorari be denied herein, since, in the conflicting Circuit Court's case—*General Casualty Co.* v. *Azteca Films, Inc.,* 9th Cir., 278

F. 2d 161, the "contrary result was reached under California law"—(App. 12)—whereas, as in the instant case, the learned Court of Appeals held that "the governing law of New York is so strong that we are constrained to reach a different result from Azteca" (App. 12)?

Argument

The Law of New York Governs the Construction to be Applied Herein.

It is conceded that the policy in question was issued by Petitioner from its principal office in New York and that therefore the law of New York governs the construction to be applied to Petitioner's exclusionary "*Products Hazard*" provision. *Fleet Messenger Service* v. *Life Insurance Company of North America*, (315 F. 2d 593, 2d Cir. 1963).

Petitioner contends, however, that the learned majority of the Court of Appeals who affirmed the judgment below, erroneously interpret the applicable New York law—which Petitioner argues is the same as California law which the Court of Appeals for the Ninth Circuit expressly applied in the allegedly conflicting case—*General Casualty Co.* v. *Azteca Films* (278 F. 2d 161).

However, the affirming majority of the Court of Appeals herein, rejected Petitioner's view of the New York law concerning which Circuit Judge Anderson said:

> "The appellant insurance company does not dispute that the appellee had constructive possession, as the trial court found, but asserts that the word 'possesssion' in the exclusion clause does not include 'constructive possession'. New York law, however, calls for a liberal interpretation of the terms of insurance policies in favor of the insured.
>
> "In *Sincoff* v. *Liberty Mutual Ins. Co.* 11 N.Y. 2d 386, 230 N.Y.S. 2d 13 (1962) the New York Court of Appeals held that where there is an ambiguous word

in an insurance policy the burden which the defendant insurer must carry is to show that the construction it urges is such 'that it would be unreasonable for the average man reading the policy to conclude' that a meaning other than that urged by the insurance company was possible and 'that its own construction was the only one that fairly could be placed on the policy' 230 N.Y.S. 2d at 16. Thus, it would seem that in New York the insurance company can avail itself of the plain meaning rule only in those cases where 'such a definition was the only one that could 'fairly be placed thereon. (Emphasis in original.) 230 N.Y.S. 2d at 15. See also Hartol Products Corp. v. Prudential Ins. Co, supra, 290 N.Y. at 49-50. The appellant has not met that test in this case. When that condition is not satisfied the rule is, that where an ambiguous word is used, 'such ambiguity should . . . [be] resolved in favor of the insured'. Sincoff v. Liberty Mutual Ins. Co., supra, 230 N.Y.S. 2d at 16; Fidelity & Casualty Co. of N. Y. v. Groth, 296 N.Y. 788, 71 N.E. 2d 470 (1947); Janneck v. Metropolitan Life Ins. Co., 162 N. Y. 574 (1900). And as the New York Court noted in Sincoff, supra, 'this rule [of favoring the insured] has particular application where exclusions are involved'. 230 N.Y.S. 2d at 16. See also Shneiderman v. Metropolitan Casualty Company of N. Y., 14 App. Div. 2d 284, 289, 220 N.Y.S. 2d 947, 951 (1961); Sperling v. Great American Ins. Co., 7 N.Y. 2d 442, 447, 199 N.Y.S. 2d 465, 469 (1961); Birnbaum v. Jamestown Mut Ins. Co., 298 N.Y. 305, 313, 83 N.E. 2d 128 (1948). The rule would seem to have special vigor when applied to a policy such as the one involved here which is by its own terms denominated a 'comprehensive general liability policy'. Cf. Sincoff, supra, 230 N.Y.S. 2d at 16, where it was said that 'a vague exclusion . . . should not be permitted to prevent indemnity' where the policy was of the kind denominated 'all risks' by the insurance company.

"Appellant relies heavily upon the decision of the Ninth Circuit in General Casualty Co. v. Azteca Films, Inc., 278 F. 2d 161 (1960), a case which presents a set of facts virtually identical to those in the

present case, and in which a contrary result was reached under California law. We feel, however, that the governing law of New York is so strong that we are constrained to reach a different result from Azteca". (App. 10-12).

UNDER NEW YORK LAW—PARTICULARLY CONCERNING EXCLUSIONARY PROVISIONS—ANY REASONABLE INTERPRETATION FAVORABLE TO THE INSURED, MUST BE ADOPTED

In *Sincoff* v. *Liberty Mutual Fire Insurance Co.* (11 N. Y. 2d 386), the defendant insurer declined to pay a claim for damage done by carpet beetles, on the ground that the policy expressly excluded liability for all damage done by "moths, vermin and inherent vice". The insurer argued that "carpet beetles" fell within the category of vermin, as that term was used in the policy.

Reviewing the varying dictionary definitions of the word "vermin", the New York Court of Appeals said:

> "The burden was on the defendant in this case to establish that the term 'vermin' not only was susceptible of being defined by the average man so as to include carpet beetles, but that such a definition ***was the only one that could 'fairly be placed thereon'.*** (Hartol Products Corp. v. Prudential Ins. Co., 290 N. Y. 44, 49-50, 47 N. E. 2d 687, 690-691; Bronx Sav. Bank v. Weigandt, 1 N. Y. 2d 545, 551, 154 N. Y. S. 2d 878, 882, 136 N. E. 2d 848, 851, 60 A. L. R. 2d 1422; see also, Piliero v. Allstate Ins. Co., 12 A. D. 2d 130, 134, 209 N. Y. S. 2d 90, 93; D'Agostino Excavators v. Globe Ind. Co., 7 A. D. 2d 483, 485, 184 N. Y. S. 2d 378, 380). It was not sufficient for the defendant to demonstrate that a purchaser of the policy involved herein might have construed 'vermin' to include carpet beetles. Defendant, to derive any benefit from the exclusory clause, was obliged to show (1) that it would be unreasonable for the average man reading the policy to conclude that non-parasitic carpet beetles were not vermin and (2) *that its own con-*

struction was the only one that fairly could be placed on the policy. This the defendant was unable to do. (Emphasis added).

* * *

"This rule has particular application where exclusions are involved. (Schneiderman v. Metropolitan Cas. Co. of N. Y., 14 A. D. 2d 284, 289, 220 N. Y. S. 2d 947, 951; Matsuo Yoshida v. Liberty Mut. Inc. Co., 9 Cir. 240 F. 2d 824, 826; Mohawk Val. Fuel Co. v. Home Ind. Co., 8 Misc. 2d 445; 165 N. Y. S. 2d 357; Sperling v. Great Amer. Ind. Co., 7 N. Y. 2d 442, 447, 199 N. Y. S. 2d 465, 469, 166 N. E. 2d 482, 484; Birnbaum v. Jamestown Mut. Ins. Co., 298 N. Y. 305, 313, 83 N. E. 2d 128, 132.)" (Empasis added)

Thus it is clear that under New York law, the insurer must establish that the only interpretation which can be given to the language of its exclusionary provision is the one upon which the insurer predicates its disclaimer.

This basic principle of construction in favor of an assured—is the applicable law in the overwhelming majority of jurisdictions—except in California, in which jurisdiction *General Casualty Co. of America* v. *Azteca Films, Inc.* (278 F. 2d 161; C. A. 9th)—upon which Petitioner relies—was determined.

***General Casualty Co. of America* v. *Azteca Films, Inc.* (278 F. 2d 161; C. A. 9th)—which Petitioner contends constitutes a conflicting Court of Appeals authority, was decided on the basis of California law—and therefore is neither conflicting nor apposite.**

Under California law (which the Court expressly pointed out had to be applied), unlike the New York rule, the meaning to be attributed to language in an insurance policy was *"what a reasonably prudent person * * * would have understood them to mean"*, (id. 168) and the *"concept of constructive possession is the sort of concept that would more likely occur to a lawyer"* (id. p. 168).

As previously noted—the "Opinion" expressly points out that the Court's conclusion was arrived at by applying California law since:

> "The policy was executed in the State of California and it is agreed that the laws of the State of California control in the construction of the policy" (id. p. 163).
>
> • • •
>
> "The test to be applied by the Court in determining whether there is ambiguity is not what the insurer intended its words to mean, but what a reasonably prudent person applying for insurance would have understood them to mean. *Trousdell* v. *Equitable Life Ass. Soc. of U. S.*, 55 Cal. App. 2d 74, 130 P. 2d 173; *N. Y. Life Ins. Co.* v. *Hiatt*, 9 Cir. 140 F. 2d 752. In other words, the criterion is ambiguity from the standpoint of a layman, not from that of a lawyer".
>
> • • •
>
> "Applying these rules to the instant exclusionary clause, it would seem that the word 'possession' as here used would convey to the ordinary mind, the layman, the idea of actual possession. The concept of constructive possession is the sort of concept that would more likely occur to a lawyer" (pp. 167-8).

In dramatic contrast, as previously noted, the applicable New York law which is the standard for construction of exclusionary provisions, as expressed by the New York Court of Appeals in *Sincoff* v. *Liberty Mutual Fire Ins. Co.* (11 N.Y. 2d, 386) is:

> "Defendant, (referring to insurer) to derive any benefit from the exclusory clause, was obliged to show * * * that its own construction was the *only one* that fairly could be placed on the policy".
>
> • • •
>
> "This rule has particular application where exclusions are involved." (citing cases) (p. 391; Emphasis added).

In the instant case, if Respondent were to adopt the construction which the Petitioner insurer urges, namely to interpret phrase "relinquish possession" to mean the mere handing over of the physical custody of an article, such a construction would not only wipe out the insurance coverage which the policy in suit herein expressly grants, but would render the policy meaningless. The policy insures the Respondent—not only at its branch office in the particular State in which it is located, but also "elsewhere in the State of North Carolina".* In an attempt to reconcile this patent contradiction between coverage "elsewhere in the State" and Petitioner's view that mere relinquishing of physical custody of an article is sufficient to justify disclaimer, Petitioner's counsel—in addressing the Jury, clearly implied that what Respondent could have done in order to remain covered by the policy, was to send its representatives along with Respondent's advertising material—wherever such articles were shipped to a customer "elsewhere in the State". It would be difficult to conceive of a more unreasonable interpretation, for, as Petitioner views it—every time that Respondent shipped any advertising material for display, or a motion picture trailer to an exhibitor for preview screening, Respondent would be obligated to have its own representative accompany the carrier, in order that Respondent5s "Comprehensive General Liability Policy" coverage might not thereby be rendered wholly ineffective.

Accordingly, in the instant case, to adopt the construction which Petitioner urges herein, would not merely nullify

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* Similar throughout-the-state coverage is expressly provided in the coverage schedules, for the States of North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Washington, Wisconsin, California, Colorado, Connecticut, District of Columbia, Georgia, Illinois, Indiana, Iowa, Louisiana, Michigan, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey and New York. (See Schedules attached to Ex. 1, immediately following 280a.)

other express provisions in the policy, but would completely frustrate the obvious purpose of the insurance coverage for which Respondent paid very substantial premiums. Settled canons of construction applicable even in ordinary contracts (let alone insurance policies to which more rigid standards apply), forbid any construction which destroys or frustrates the purpose for which the contract was entered into.

SINCE IT IS INDISPUTABLE THAT THE DECISION HEREIN WAS DETERMINED UNDER APPLICABLE NEW YORK LAW—AND THE ALLEGEDLY CONFLICTING CASE CITED BY PETITIONER, I.E. *GENERAL CASUALTY COMPANY OF AMERICA* v. *AZTECA (SUPRA)* WAS DECIDED PURSUANT TO APPLICABLE CALIFORNIA LAW—NO CONFLICT EXISTS DESERVING OF REVIEW BY THIS HONORABLE COURT

The landmark decision by this Honorable Court in *Erie R. Co.* v. *Tompkins* (304 U.S. 64) required the Honorable Court of Appeals herein to determine the instant action according to *New York* law—since it is conceded that the policy of insurance herein was issued and delivered in the State of New York.

The Opinion by the Court of Appeals for the 9th Circuit, expressly reveals that its decision in the *General Casualty* case, was arrived at by the application of *California* law.

Accordingly, Respondent respectfully submits that Petitioner's claim of conflicting Circuit Court decisions—is unjustified. There is, therefore, no opportunity for this Honorable Court "to secure uniformity of decision", which is the functional reason for the granting of Certiorari when truly conflicting Circuit Court decisions have been made. In this connection, this Honorable Court said, in *Ruhlin* v. *New York Life Insurance Co.* (304 U.S. 202):

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting Certiorari" (p. 206).

For obvious reasons, since the principle of *Erie R. Co.* v. *Tompkins* (*supra*), makes "uniformity of decision" impossible where the respective States' laws are different—the petition herein should be denied.

CONCLUSION

Respondent respectfully submits, that for all of the foregoing reasons, Petitioner's application for a Writ of Certiorari, should be in all respects denied.

Respectfully submitted,

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REPLY BRIEF

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